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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

FROTA OCEANICA BRASILEIRA, S.A.,

Petitioner,

vs.

STARKHEISER DaSILVA MATOS PIRES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK APPELLATE DIVISION, FIRST DEPARTMENT

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE

In this admiralty and maritime case, Petitioner, Frota Oceanica Brasileira, S.A. seeks plenary review of a decision of the New York State Supreme Court, Appellate Division, First Department, affirming a judgment of the New York State Supreme Court that (1) awarded respondent S.M. Pires over

$1,323,666.70 in maintenance and cure, most of which is a lump-sum award of forty years worth of "future" cure and (2) held Frota liable for consequential damages, attorneys' fees and punitive damages, which alone are presently quantified at $24,000,000.00, for "willful" termination of maintenance and cure.

Pires' opposing brief contends that certiorari is inappropriate because seamen are entitled to maintenance and cure until "maximum cure" is achieved and because recent decisions of this Court are said to authorize awards of punitive damages in a generic sense. Pires also contends that Frota waived the right to appeal the issue of punitive damages, and that Brazilian law governs this case.

The opposing brief sets forth no authority calling into question the existence and substantiality of the issues presented for review by Frota's petition. The fact remains that the granting of lump sum future cure for the lifetime of a seaman is unprecedented. Such an award is in conflict with long-standing decisions of this Court. Further, there has been conflict among the Circuits as to the availability of punitive damages for failure to provide maintenance and cure, and it appears that *Miles v. Apex Marine Corp.*, __ U.S. __, 111 S.Ct. 317 (1990) may resolve that conflict. The significant questions presented by Frota's petition were preserved, they are timely presented, and they are deserving of consideration by this Court.

REASONS FOR GRANTING THE WRIT

I. There is No Precedent for Lump Sum Awards of Maintenance and Cure for Life

The case law cited by the Respondent deals with the issue of "maximum cure," not the availability of a lump sum award of future cure for life. Moreover, Respondent's cases support the view that maintenance and cure should be limited to

specific treatment needed in the immediate future. For example, *Brown v. Dravo Corp.*, 157 F. Supp. 265 (W.D. Pa. 1957) *aff'd*, 258 F.2d 704 (3d Cir. 1955) *cert. denied*, 359 U.S. 960 (1959), cited by Respondents as an example of future cure "for an indefinite period," actually ordered payment of nine years of past cure and payment for specific surgery needed at the time of the trial. The court directed that "immediate steps be taken in this direction." 157 F. Supp at 268.

Similarly, *Scott v. Lykes Bros. Steamship Co., Inc.*, 152 F. Supp. 104 (E.D. La 1957), while taking an expansive view of "maximum cure," only awarded maintenance and cure due up to the time of trial. There was no cash award for future cure.

Sobosle v. United States Steel Corp., 359 F.2d 7 (1966), recognized a seaman's right to return for further maintenance and cure when and as needed, in that case twenty years after the injury. There was no cash award for future cure.

Thus, the authorities cited by the Respondent do not support lump sum awards of future cure for life, and do not diminish the importance and validity of the future cure issues presented by Frota's petition. The authorities are consistent with Frota's position.

II. The Punitive Damage Liability Finding Should Be Reviewed

The issue as to whether punitive damages are recoverable under the general federal maritime law for failure to provide maintenance and cure was not resolved by *Pacific Mutual Life Insurance Co. v. Haslip*, __ U.S.__, 111 S.Ct. 1032 (1991). *Haslip* dealt only with state law. Federal maritime law is a matter uniquely within this Court's jurisdiction and this Court is not bound by any state law or procedure. The availability of punitive damages under the law

of the several states is irrelevant. The conflict among the circuits as to the availability of punitive damages in a maintenance and cure case is clear. *Miles v. Apex Marine, supra,* appears to resolve the conflict. The Court should grant certiorari to consider the issue fully, or summarily reverse the judgment and remand for consideration in light of *Miles*.

Frota timely preserved all objections to the instructions and standards applied by the trial court in connection with the finding that Frota had "willfully" terminated maintenance and cure. (R. at 1675-1676). Thus, even if punitive damages are recoverable for "willful" failure to provide maintenance and cure, Frota's liability for punitive damages in this case is properly presented for review.

III. The Decision Below is Sufficiently Final to Permit Review

That portion of the judgment below awarding maintenance and cure which Frota has paid is sufficiently final for review at this time. Payment of a money judgment is the analytical equivalent of the transfer of physical property, and it has long been recognized that a judgment requiring transfer of property is sufficiently final for review. *Forgay v. Conrad,* 6 How. 201 (1848).

As to that portion of the judgment finding Frota liable for punitive damages in some form, Frota has exhausted all appeals as of right in the New York State Court system. The issue of Frota's "willfulness" in terminating maintenance and cure has been decided by the highest New York State court willing to consider the issue. This issue will survive and require decision regardless of the outcome of any pending state court proceedings or automatic appeals therefrom. It appears that the issue is properly presented for review at this time.

IV. If Brazilian Law is Applicable, It is Subject to Review By This Court

Respondent's brief suggests that the judgment below is immune from review by this Court because it is grounded in a jury finding on the substance of Brazilian law. (Brief in Opposition at 8). This statement is factually incorrect. The jury never considered any issues as to the substance of Brazilian law, nor should they have done so. The court below ruled on the substance of Brazilian law. Further, a review of the lower court's post trial opinion reveals that, aside from a general observation that Brazilian law recognizes maintenance and cure, the decision below is based entirely on United States law. An interpretation of domestic or foreign law is a question of law subject to review by this court *de novo*. Rule 44.1 Fed. R. Civ. P.; *Weston Banking v. Turkiye Garanti Bankasi*, 86 A.D.2d 544, 446 N.Y.S.2d 67 (1st Dept. 1982) *aff'd*, 57 N.Y.2d 315, 442 N.E.2d 1195, 456 N.Y.S.2d 684 (1982).

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review that portion of the order of the New York Supreme Court Appellate Division, First Department which affirmed the judgment of the New York Supreme Court.

Respectfully submitted,

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